

September 29, 2023

The Honorable Brenda Mallory
Chairman
Council on Environmental Quality
730 Jackson Place, NW
Washington, DC 20503

Re: Docket No. CEQ-2023-0003

Dear Chairman Mallory,

We write to express our opposition to the Council on Environmental Quality's (CEQ) Notice of Proposed Rulemaking titled "Bipartisan Permitting Reform Implementation Rule," Docket No. CEQ-2023-0003 (hereinafter "Proposed Rule").

The Fiscal Responsibility Act of 2023 (FRA; PL 118-5) was signed in to law on June 3, 2023 and included the most substantive amendments to the National Environmental Policy Act (NEPA) since its enactment. Congress wrote the bipartisan NEPA amendments included in the FRA to simplify what has become an overcomplicated, needlessly burdensome, and seemingly endless federal environmental review process. Specifically, these provisions include requirements for schedules, timelines, and page limits, as well as clarifying roles of lead, joint, and cooperating agencies. Congress's intent and direction to the CEQ and federal agencies are clear: provide more certainty and transparency for project sponsors and investors. However, in the Proposed Rule, the CEQ has acted contrary to clear congressional intent and explicit direction. Instead, the Proposed Rule injects more uncertainty and potential legal liability into an already labyrinthine process. The Administration is trying to mask this willful misinterpretation of the law by deceptively referring to the overall proposal as the "Bipartisan Permitting Reform Implementation Rule." The Proposed Rule seeks to implement partisan policy priorities that undermine the bipartisan NEPA reforms in the FRA.

The CEQ proposes to remove language on "unexhausted comments" from existing regulations. Currently, agencies are only to consider comments that are submitted in a timely fashion during comment periods; late comments are to be "forfeited and exhausted" from consideration. NEPA regulations that direct stakeholders to abide by the Administrative Procedure Act's notice and comment process to submit their views within the comment period is simply commonsense and provides certainty to the environmental review process. Public comment periods of specified length are provided to allow for fulsome public engagement while also ensuring predictability and timely conclusion of the overall rulemaking process. The CEQ's proposal to strike this language seems only to create additional delays in issuing a final record of decision, and

inevitably opens Federal agencies up to scrutiny if they weigh or ignore comments submitted after closure of the notice and comment period in service of a particular outcome.

Adding to the unfortunate air of politicization around NEPA implementation, the CEQ proposes a new section 1506.12, “Innovative Approaches to NEPA Reviews.” This section would provide preferential treatment in the environmental review process for certain types of projects favored by the Biden Administration. Nothing in the FRA directed the Administration to prioritize and streamline the NEPA process for a certain class of projects – such as renewable energy. Yet, the CEQ is unilaterally changing the nature and substance of the NEPA process to benefit the Administration’s policy priorities. This is a troubling precedent that will certainly be leveraged by future administrations to advantage their preferred types of infrastructure. The CEQ must implement the FRA consistently for all types of projects and keep politics out of the environmental review process.

The CEQ proposes to remove language that confirms longstanding legal precedent recognizing that NEPA is purely a procedural statute. The NEPA process is not to be outcome-determinative, and only requires that Federal agencies assess potential environmental impacts of proposed major Federal actions through the requisite process.¹ The CEQ even acknowledges that “NEPA does not mandate particular results in specific decision-making processes.”² Yet through amendments to the actual regulatory text and direction to consider and preference certain alternatives, the CEQ intends to insert language that gives the appearance of NEPA being outcome-determinative – again, in favor of the types of projects preferred by the current Administration.

Finally, the CEQ proposes to expand the scope of effects to be considered in the NEPA process by requiring agencies to analyze the effects on those communities deemed by the Biden Administration to have environmental justice concerns, as well as the effects of climate change across the globe, from the proposed action and alternatives. The CEQ seems intent to rely upon subjective criteria and questionable modeling in assessing the costs and benefits for residents of environmental justice communities as well as global citizens over arbitrary time horizons in order to arrive at a predetermined outcome on the merits of a particular project. Again, bipartisan congressional intent was to simplify the NEPA process, improve the timeliness of reviews, and reduce politicization around infrastructure investments, but the CEQ’s proposal tacks in the opposite direction through proposed expansion of the scope of effects. The outcome will be an arbitrary, capricious, and endlessly expansive list of items that project sponsors may be directed to consider as part of the process that will inevitably add only more complexity, delay, and legal liability to the NEPA process.

¹ See, e.g., *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (“[I]t is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process.”).

² National Environmental Policy Act Implementing Regulations Revisions Phase 2, 88 Fed. Reg. at 49,924 (July 31, 2023).

In summary, the changes made in the CEQ's Proposed Rule would collectively add more confusion, expand the scope of the NEPA process, extend its length, open the door to even more lawsuits and accusations of political favoritism that will delay or stop projects while undermining public and stakeholder confidence. All those outcomes are directly contrary to the bipartisan congressional intent of the FRA. The only types of projects that may see some process efficiencies from the Proposed Rule are the projects that currently have the backing of the Biden Administration. This troubling precedent paves the way for future administrations of either party to similarly avail their prioritized projects at the expense of others. We urge the CEQ to correct course and engage in a rulemaking process that implements the FRA and adheres to the clear direction Congress gave to make the NEPA process more efficient for *all types* of projects.

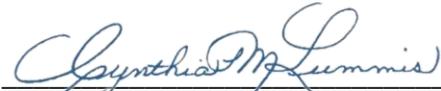
Sincerely,



Shelley Moore Capito
Ranking Member
Environment & Public Works Committee



Kevin Cramer
United States Senator



Cynthia M. Lummis
United States Senator



Markwayne Mullin
United States Senator



Pete Ricketts
United States Senator



John Boozman
United States Senator



Roger F. Wicker
United States Senator



Dan Sullivan
United States Senator



Lindsey O. Graham
United States Senator